JAN 28 1927
WM. R. STANSBURY
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Case No. [redacted] 171

Supreme Court of the United States

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased.
Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SAME.

JOHN W. COWELL,
Attorney for Petitioner.

COURT INDEX PRESS, 414-20 MAIN, CINCINNATI : : JANUARY, 1927

INDEX

	PAGE
Petition For Writ of Certiorari and Brief in Support of Same	1
Brief	2

LIST OF AUTHORITIES

Corpus Juris, Vol. 21, on page 1228-1232	3
Fisher v. C. C. C. & St. L. RR., 169 Federal Report, page 965	5
Standard Oil Company v. Anderson, 212 U. S., 215	5
Woodrow Iron Co. v. Lindbauch, 276, Federal Reporter, page 1	5
Hardy v. Shedden Co., 78 Federal Reporter, page 610	5
Hull v. RR. Co., 252 U. S. page 450-475	6

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Petitioner,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF SAME.

The petitioner Katherine Linstead, Executrix of the Estate of John A. Linstead, deceased, respectfully shows to this Honorable Court:

That her husband, John A. Linstead, deceased, was a freight conductor for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company that he was killed through a rear end collision while riding in a caboose on the tracks of the Chesapeake & Ohio Railway Company between Stevens, Kentucky, and Dayton, Kentucky.

An action was commenced under the state statutes of Kentucky against The Chesapeake & Ohio Railway Company. When the case came on for trial, counsel for the defendant, in his opening statement, made the con-

tention that the plaintiff had no case under the Kentucky statutes but that the liability of the defendant, if any, was under the Federal Employers Liability Act, because John A. Linstead, at the time he was killed was working for the defendant and not the Big Four Ry. Co. who paid him his wages and was also engaged in interstate commerce, and therefore, could not maintain an action under the Kentucky Statutes.

Not wishing to take issue on this point, counsel for plaintiff agreed to it, and offered an amended petition. The defendant then maintained that it was not ready to go to trial under the Federal Employers Liability Act and asked for a continuance, which was granted. Instead of trying the case on the amended petition a new suit (this case) was filed under the Federal Employers Liability Act.

There was no dispute about the facts in this case. The defendant offered no evidence. The trial Court instructed the jury that under the facts, as proven John A. Linstead became an employe of The Chesapeake & Ohio Railway Company. The jury returned a verdict in the sum of $16,500.00 upon which verdict a judgment was rendered.

Respondent's contention in the Court of Appeals was that the action should have been under the State Statute instead of the Federal Act. On this contention alone the Court of Appeals set aside the verdict.

BRIEF.

Our contention is that the respondent when sued under the State Statute of Kentucky after setting up as a defense that the liability, if any, was under the Employers Liability Act, is now estopped to deny that

the liability is under the Federal Employers Liability Act and from asserting that the action should be under the State Statute.

Corpus Juris, Vol. 21, on page 1228.

> "A Claim made or position taken in a former action or judicial proceeding will, in general, estop the party to make an inconsistent claim or to take a conflicting position in a subsequent action or judicial proceeding to the perjudice of the adverse party."

Corpus Juris, Vol. 21, on page 1232.

> "The rule has been applied also to inconsistent positions in respect of question of process, remedy, and parties."

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> "Where a party successfully contends that the Court has jurisdiction of a cause, he cannot question such jurisdiction in subsequent proceedings. And on the other hand, where he successfully defends an action on the ground that the court is without jurisdiction he cannot in subsequent action or proceedings assume a position inconsistent therewith. However, it has been held that one who successfully asserts the validity of a decree of a foreign tribunal is not estopped to deny its validity in a subsequent action, the view being taken that the principle of equitable estoppel cannot be invoked to confer jurisdiction on a foreign tribunal."

It seems a travesty on justice to permit the defendant, when sued under the State Statute, to set up the defense, that the liability, if any, was under the Federal Act and when sued under the Federal Act to set up that liability, if any, was under the State Statute.

Nevertheless, that is just what the defendant is doing in this case. The statement of counsel for the defendant stating their defense to the jury was offered in evidence in this case part of said statement is as follows:

Pages 41 and 42 of the record.

> "There was an arrangement between the Chesapeake & Ohio and the Big Four by which they exchanged service. The C. & O. would do a service for the Big Four and the Big Four would do a similar service for the C. & O.; and it is our contention that by reason of the work going on Mr. Linstead at that time was an employe of the C. & O. engaged in commerce for the C. & O. and aiding and assisting the C. & O. at that time in its interstate commerce.
>
> The Court: What bearing will that have on the case?
>
> Mr. Galvin: The action ought not to have been brought under the Kentucky Statute but under the Employers' Liability Act. That is a question that we think is for your Honor, and not for the jury."

We also contend that the case is rightfully brought under the Federal Employers Liability Act. The undisputed facts are that the decedent was employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as a freight conductor, that this railroad does not operate any lines or trains in the state of Kentucky, that he was sent into the State of Kentucky to Stevens, Kentucky to take charge of a train of cars which it was the duty of the respondent, the Chesapeake & Ohio Railroad Company, to deliver to the Big Four in Cincinnati. While on the tracks of the C. & O. Railroad Company he was doing their work under their supervision and control, furnished with their

time table and their rule books and took all instructions from them. They were his master and he was their servant. Therefore, by adoption, he became an employe of the C. & O. Railroad Company.

Fisher v. *C. C. C. & St. L. RR.*, 169 Federal Report, page 956.

In this case on a question involving taxation the Court held that the Cleveland, Cincinnati, Chicago & St. Louis Railway Company was not doing business in the State of Kentucky.

Standard Oil Company v. *Anderson*, 212 U. S., 215, lays down the following rule.

"To determine whether a given case falls within one class or the other, we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power of control and directs the servants in the performance of their work."

Woodrow Iron Co. v. *Lindbauch*, 276, Federal Reporter, page 1, second syllabus.

"An agent employed may with his consent be hired by and employed to a third party for some special service so as to become as to that service an employe of such third party. If as to that service he becomes subject to the direction and control of such third party."

Hardy v. *Shedden Co.*, 78 Federal Reporter, page 610.

Third Paragraph. "Held, further, that plaintiff, though the general servant of defendant, was in this service the special servant of the Grand Army Post and it, and not defendant was liable as master for any negligence in the construction of the superstructure which he was to use in his work."

The respondent relies on the case of *Hull* v. *RR. Co.*, 252 U. S. page 450-475 which we content is easily distinguished from the case at bar. The facts in the Hull case are as follows:

The Western, Maryland Railway Company operated a line from Hagerstown, Maryland to Lurgan, Pennsylvania and the Philadelphia and Reading operated a line which exended from Lurgan, Pa. to Rutherford. The Western Maryland Railroad operated their trains clear through to Rutherford with their own crews and the Philadelphia & Reading Railroad operated their trains from Rutherford clear through to Hagerstown, Md. Each railroad operated their own trains one half the way over the line of the other railroad. John Hull, while working for the Western Maryland Railroad, was killed on that part of the road belonging to the Philadelphia & Reading Railroad and sued the Philadelphia & Reading Railroad. The verdict was directed in favor of the defendant, affirmed by the Court of Appeals and by the Supreme Court. In affirming the verdict the Court said.

> "It is clear that each company retained control of its own train crews, that what the latter did upon the line of the other was done as a part of their duty to the general employer."

In the case at bar, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, did not retain control of John A. Linstead after he went out of the state and into Kentucky on the tracks of the Chesapeake & Ohio Railroad. He was then under the exclusive and sole control of the Chesapeake & Ohio. Justice Clark wrote a dissenting opinion in the Hull Case because he was unable to find that each company retained control

of its employees and he used the following language.

> "Upon the contrary it seems to me that it is clear that neither company retained any control whatever over the crews of the line employed by it while on the lines of the other company."

Another distinguishing feature between the Hull case and the case at bar is that in the case at bar, John A. Linstead was doing the work of the Chesapeake & Ohio Railroad Company, it being their duty to deliver the cars to the Big Four at Cincinnati. In the Hull case each company operated their own trains over the tracks of the other and Hull was doing the work of the company which primarily employed him. We therefore contend that the Court of Appeals erred in reversing the judgment of the District Court.

We contend that the question involved is an important question of law. The decision of the Court of Appeals extends the doctrine in the Hull case and deprives, in this instance, a railroad man of the protection of the Federal Employers Liability law which was enacted for the protection of the railroad man while operating trains in interstate commerce.

In the Hull case, the road which primarily employed Hull would have been liable under the Federal Employers Liability Act but in this case the road employing John A. Linstead could not possibly be liable for his death. They had absolutely nothing at all to do with the operation of trains on the Chesapeake & Ohio road. In the Hull case the company primarily employing Hull operated their trains regularly over the tracks of the other road. The decision of the Court of Appeals

in this case means that under circumstances such as this a railroad man, although he may actively engaged in interstate commerce is deprived of the benefit of the Federal Employers Liability law enacted for his protection.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case entitled The Chesapeake & Ohio Railway Company, vs Katherine Linstead, Executrix of the Estate of John A. Linstead, deceased, case No. 4626, to the end that the said case, may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioner may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

Katherine Linstead, Extrx. of
Estate John Linstead, Deceased.

JOHN W. COWELL,
Attorney for Petitioner.

No. 32427.

DEC 22 1927
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1927

171

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased

Plaintiff in Error

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

John W. Cowell,
Attorney for Plaintiff in Error.

COURT INDEX PRESS, CINCINNATI, OHIO 11 DECEMBER, 1927

LIST OF AUTHORITIES

	Page
Corpus Juris, Vol. 21, on page 1228 1232	3
Fisher v. C. C. C. & St. L. RR., 169 Federal Report, page 965	5
Standard Oil Company v. Anderson, 212 U. S., 216	5
Woodrow Iron Co. v. Lindbauch, 276, Federal Reporter, page 1	5
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Supreme Court of the United States

October Term, 1927

171

KATHERINE LINSTEAD, Executrix of the Estate of JOHN A. LINSTEAD, deceased.

Plaintiff in Error,

No. 32427. vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

Brief for Plaintiff in Error.

John A. Linstead, deceased, was a freight conductor for the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. He was killed through a rear end collision while riding in a caboose on the tracks of the Chesapeake & Ohio Railway Company between Stevens, Kentucky, and Dayton, Kentucky.

An action was commenced under the state statutes of Kentucky against The Chesapeake & Ohio Railway Company. When the case came on for trial, counsel for the defendant, in his opening statement, made the contention that the plaintiff had no case under the Kentucky statutes but that the liability of the defendant,

if any, was under the Federal Employers Liability Act, because John A. Linstead, at the time he was killed was working for the defendant and not the Big Four Ry. Co. who paid him his wages and was also engaged in interstate commerce, and therefore, could not maintain an action under the Kentucky Statutes.

Not wishing to take issue on this point, counsel for plaintiff agreed to it, and offered an amended petition. The defendant then maintained that it was not ready to go to trial under the Federal Employers Liability Act and asked for a continuance, which was granted. Instead of trying the case on the amended petition a new suit (this case) was filed under the Federal Employers Liability Act.

There was no dispute about the facts in this case. The defendant offered no evidence. The trial Court instructed the jury that under the facts, as proven John A. Linstead became an employe of The Chesapeake & Ohio Railway Company. The jury returned a verdict in the sum of $16,[illegible] upon which verdict a judgment was rendered.

Respondent's contention in the Court of Appeals was that the action should have been under the State Statute instead of the Federal Act. On this contention alone the Court of Appeals set aside the verdict.

BRIEF.

Our contention is that the respondent when sued under the State Statute of Kentucky after setting up as a defense that the liability, if any, was under the Employers Liability Act, is now estopped to deny that the liability is under the Federal Employers Liability Act and from asserting that the action should be under the State Statute.

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We also contend that the case is rightfully brought under the Federal Employers Liability Act. The undisputed facts are that the decedent was employed by the Cleveland, Cincinnati, Chicago and St. Louis Railway Company as a freight conductor, that this railroad does not operate any lines or trains in the state of Kentucky, that he was sent into the State of Kentucky to Stevens, Kentucky to take charge of a train of cars which it was the duty of the respondent, the Chesapeake & Ohio Railroad Company, to deliver to the Big Four in Cincinnati. While on the tracks of the C. & O. Railroad Company he was doing their work under their supervision and control, furnished with their time table and their rule books and took all instructions from them. They were his master and he was their servant. Therefore, by adoption, he became an employe of the C. & O. Railroad Company.

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> "It is clear that each company retained control of its own train crews, that what the latter did upon the line of the other was done as a part of their duty to the general employer."

In the case at bar, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, did not retain control of John A. Linstead after he went out of the state of Ohio and into Kentucky on the tracks of the Chesapeake & Ohio Railroad. He was then under the exclusive and sole control of the Chesapeake & Ohio, Page 37 of record. Justice Clark wrote a dissenting opinion in the Hull Case because he was unable to find that each company retained control of its employees and he used the following language.

> "Upon the contrary it seems to me that it is clear that neither company retained any control whatever over the crews of the line em-

ployed by it while on the lines of the other company."

Another distinguishing feature between the Hull case and the case at bar is that in the case at bar, John A. Linstead was doing the work of the Chesapeake & Ohio Railroad Company, it being their duty to deliver the cars to the Big Four at Cincinnati. In the Hull case each company operated their own trains over the tracks of the other and Hull was doing the work of the company which primarily employed him. We therefore contend that the Court of Appeals erred in reversing the judgment of the District Court.

We contend that the question involved is an important question of law. The decision of the Court of Appeals extends the doctrine in the Hull case and deprives, in this instance, a railroad man of the protection of the Federal Employers Liability act which was enacted for the protection of a railroad man while operating trains in interstate commerce.

In the Hull case, the road which primarily employed Hull would have been liable under the Federal Employers Liability Act because the Court found they retained control over him, but in this case the road employing John A. Linstead could not possibly be liable for his death. They had absolutely nothing at all to do with the operation of trains on the Chesapeake & Ohio road. In the Hull case the company primarily employing Hull operated their trains regularly over the tracks of the other road. The decision of the Court of Appeals in this case means that under circumstances such as this a railroad man, although he may actively be engaged in interstate commerce is deprived of the benefit of the Federal Employers Liability law enacted for his protection.

Wherefore, your petitioner respectfully prays that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court and the judgment of the trial court affirmed.

Katherine Linstead, Extrx, of
Estate John Linstead, Deceased.

John W. Cowell,
Attorney for Petitioner.

JAN 9 1928
CHARLES ELMORE CROPLEY
CLERK

No. 32427

Supreme Court of the United States

OCTOBER TERM, 1927

171

KATHERINE LINSTEAD, executrix of the Estate of John A. Linstead, deceased,

Plaintiff in Error,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

FRANK M. TRACY,
Attorney for Defendant in Error.

POINTS AND AUTHORITIES.

I.

Linstead was not an employee of The Chesapeake & Ohio Railway Company within the meaning of the Federal Employers Liability Act.

Hull v. *Philadelphia & Reading Ry. Co.*, 252 U. S. 475.
Wagner v. *C. & A. R. R. Co.*, 265 Ill. 250.
M. K. & T. Ry. Co. v. *West*, 134 Pac. 655.
M. K. & T. Ry. Co. v. *Blalack*, 147 S. W. 559.
Drago v. *Central R. R. Co.*, 106 Atl. 803.

II.

Defendant, The Chesapeake & Ohio Railway Co. is not estopped to contend that Linstead was not its employee.

McLaughlin v. *W. U. Tel. Co.*, 7 Fed. Rep. (2nd series) 177.
Davis v. *Walker*, 156 U. S. 689.
21 Corpus Juris, 1223.

No. 32427

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171

ATHERINE LINSTEAD, executrix of the Estate of John A. Linstead, deceased,

Plaintiff in Error,

vs.

E CHESAPEAKE & OHIO RAILWAY COMPANY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

---

ohn A. Linstead was a freight conductor in the service he Cleveland, Cincinnati, Chicago and St. Louis Rail- Company (commonly known and hereinafter referred s the "Big Four"). On the 15th day of August, 1924, he killed in a rear end collision while operating his "Big r" train on the lines of The Chesapeake & Ohio Rail- Company in Campbell County, Ky.

atherine Linstead, his administratrix, brought this on against The Chesapeake & Ohio Railway Company er the Federal Employers Liability Act, alleging that

her decedent was at the time of his death an employee of the Chesapeake & Ohio Railway Company in its interstate service. The defendant, The Chesapeake & Ohio Railway Company denied that Linstead was or ever had been in its employ.

The trial court held that under the circumstances shown, Linstead, though actually in the service of the "Big Four" was an employee of The Chesapeake & Ohio Railway Company within the meaning of the Employers Liability Act. The trial resulted in a verdict for plaintiff.

Defendant prosecuted error to the Circuit Court of Appeals for the Sixth Circuit, and that court reversed the trial court, handing down the following memorandum opinion.

> "We are unable effectively to distinguish the facts of this case from those of *Hull* v. *Philadelphia, etc., Ry.*, 252 U. S. 475—an opinion which apparently was not brought to the attention of the trial court. It thus becomes necessary to reverse the judgment and remand for further proceedings. We express no opinion as to whether an amendment pursuant to the rule of the *Kinney Case*, 260 U. S. 340, can be allowed in the trial court if now desired."

In this court, the petitioner, Katherine Linstead, administratrix, is contending—

First. That her decedent was an employee of The Chesapeake & Ohio Railway Company within the meaning of the Federal Employers Liability Act, and, therefore, the trial court was correct and the Court of Appeals in error in their respective rulings upon that question.

Second. That the defendant, The Chesapeake & Ohio Railway Company was and is estopped to contend that Linstead was not its employee by reason of an act of its counsel in the trial court.

I.

LINSTEAD WAS AN EMPLOYEE OF THE "BIG FOUR" RAILROAD.

The facts are all admitted. There was no issue of fact. The Chesapeake & Ohio Railway Company maintains its Cincinnati Terminal yards at Stevens, or Silver Grove, which is situated a short distance east of the town of Dayton in Campbell County, Kentucky. The Big Four has similar yards at Riverside, which is located just west of Cincinnati in the State of Ohio.

There is an unwritten reciprocal transfer arrangement between the two railroads. The Big Four sends its engines and crews to Stevens for cars for its Chicago division, and The Chesapeake & Ohio Railway Company, in turn, sends its engines and crews to Riverside for cars for The Chesapeake & Ohio Railway Company. They pay one another with service. No money is exchanged.

When The Chesapeake & Ohio Railway crews are on the lines of the Big Four they are under the control of the Big Four and vice versa when the Big Four crews are on The Chesapeake & Ohio Railway lines they are under the jurisdiction and control of The Chesapeake & Ohio Railway Company.

The Big Four crews are furnished with Chesapeake & Ohio Railway time tables, and books of rules, which they abide by, when on The Chesapeake & Ohio line, and they likewise get their instructions for the performance of their work from Chesapeake & Ohio Railway officials.

The Big Four crews perform no Chesapeake & Ohio work while on The Chesapeake & Ohio Railway lines. They handle nothing but Big Four business. They do not handle or break up Chesapeake & Ohio trains. The cars for the Big Four are prepared for the Big Four engines and crews by The Chesapeake & Ohio employees. A Big Four engine

will deliver a cut of Chesapeake & Ohio cars from the Riverside yards, and if a cut of Big Four cars is ready at Stevens, the Big Four engine and crew will take it back to Riverside, otherwise the engine and crew will go back "light."

The Big Four crews are hired and paid by the Big Four, which alone has the power or authority to reprimand or discharge them. The Chesapeake & Ohio Railway has nothing whatever to do with the contract of employment between the Big Four and its men. This identical arrangement exists insofar as The Chesapeake & Ohio trains and crews are concerned when on the Big Four lines.

On the occasion of the accident herein in question, Linstead was a Big Four freight conductor operating under the foregoing arrangement.

He had gotten a cut of Big Four cars at Stevens and was proceeding towards Cincinnati, riding in the caboose, when a Chesapeake & Ohio commuter ran into the caboose from the rear and killed him.

The question here presented has been definitely decided by this Court in the case of *Elizabeth Hull, administratrix*, v. *Philadelphia and Reading Railway Company*, 252 U. S. 475. This case is almost exactly parallel with the one at bar, and we think is conclusive of the question here presented. For the convenience of the court we quote at length from the opinion as follows:

> "The pertinent facts are not in dispute. John M. Hull at the time he was killed and for a long time before, was in the general employ of the Western Maryland Railway Company, an interstate carrier operating, among other lines, a railway from Hagerstown, Maryland, to Lurgan, Pennsylvania, at which point it connected with a railway owned and operated

by defendant, the Philadelphia and Reading Railway Company, which extended from Lurgan to Rutherford, in the same state. Through freight trains were operated from Hagerstown to Rutherford over these two lines, and Hull was employed as a brakeman on such a train at the time he received the fatal injuries. On the previous day a crew employed by the Western Maryland Railway Company, and of which he was a member, had taken a train hauled by a Western Maryland engine from Hagerstown to Rutherford, and at the time in question, the same crew was returning with a train from Rutherford to Hagerstown. Before starting they received instructions from the yardmaster at Rutherford (an employee of the defendant company) as to the operation of the train, including directions to pick up seven cars at Harrisburg. They proceeded from Rutherford to Harrisburg, stopped there for the purpose of picking up the seven cars, and while this was being done, Hull was run over and killed by one of the defendant's locomotives.

The through freight service was conducted under a written agreement between the two railway companies which was introduced in evidence and constitutes the chief reliance of petitioner. Its provisions, so far as they need to be quoted, are as follows:

"2. Freight trains to run through between Hagerstown and Rutherford in both directions, and each company agrees to supply motive power in the above proportions (based upon mileage) so as to equalize the service performed.

4. Crews of each road to run through with their engines over the line of the other company.

5. Each company to compensate the other for the use of the other's engines and crews on their line at the following rates per hour: * * * Time to begin at Rutherford and Hagerstown when crew is called for. * * * Time to cease when the engines arrive on the fire track at Rutherford and Hagerstown.

6. The division of earnings of the traffic not to be disturbed or in any way affected by this arrangement.

7. Each company to furnish fuel and other supplies to its own engines and crews; any furnished by one to the other to be upon agreed uniform rates.

9. Neither company to be expected to do the engine cleaning and wiping for the other; where done, a charge of seventy-five cents per engine to be made.

10. Each company to be responsible and bear all damage and expenses to persons and property caused by all accidents upon its road.

16. Each company to relieve and turn as promptly as practicable the engines and crews of the other at ends of runs.

17. Each company to have the right to object and to enforce objection to any unsatisfactory employee of the other running upon its lines.

18. All cases of violation of rules or other dereliction by the employees of one company while upon the road of the other shall be promptly investigated by the owning company, and the result reported to the employing company, with or without suggestions for disciplining, the employing company to report to the other the action taken.

19. Accident reports on prescribed forms to be promptly made of all such occurrences, and where a crew of one company is operating upon the road of the other, a copy must be sent to the proper officer of each company.

20. Employees of each company to be required to report promptly, on notice, to the proper officer of the other, for investigations of accidents, etc., the fullest co-operation to be given by the one company to the other in all such matters.

21. The employees of each company while upon the tracks of the other shall be subject to and conform to the rules, regulations, discipline, and orders of the owning company.'

We hardly need repeat the statement made in *Robinson* v. *Baltimore & Ohio R. Co.*, 237 U. S. 84, 94, 59 L. ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress

used the words "employee" and "employed" in their natural sense and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recited, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—certainly for the purposes of the act—an employee of the Western Maryland Railway Company only. It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies. See *Standard Oil Co.* v. *Anderson*, 212 U. S. 215, 226, 53 L. ed. 480, 485, 29 Sup. Ct. Rep. 252."

As we have stated, the foregoing case appears to us to be decisive of the question here presented, and it is scarcely necessary to cite additional authority, but we desire to call the court's attention to the following cases, which are in accord with the ruling of this court in the Hull case.

Wagner v. *C. & A. R. R. Co.*, 265 Ill. 250.
M. K. & T. Ry. Co. v. *West*, 134 Pac. 655.
M. K. & T. Ry. Co. v. *Blalack*, 147 S. W. 559.
Drago v. *Central R. R. Co.*, 106 Atl. 803.

Counsel for Linstead say that the instant case is to be distinguished from the Hull case in two particulars.

First. That the Big Four did not retain control over Linstead after he went on the lines of The Chesapeake & Ohio Railway Company.

Second. Linstead when on the lines of The Chesapeake & Ohio Railway Company was doing the work of this company and not of the Big Four Company.

But there are no distinguishing facts. Linstead's service was for his own company, as was Hull's. In each case the employee is subject to the rules and regulations of the connecting carrier when on its lines, but, as said in the Hull case—

> "It is clear that each company retained control of its own train crews; that what the latter did upon the line of the other road was done as a part of their duty to the general employer; and that, so far as they were subject while upon the tracks of the other company to its rules, regulations, discipline, and orders, this was for the purpose of co-ordinating their movements to the other operations of the owning company, securing the safety of all concerned, and furthering the general object of the agreement between the companies."

II.

THE ALLEGED ESTOPPEL BY ACT OF COUNSEL.

The only thing appearing in the record bearing upon this matter is the following (page 39):

MAURICE L. GALVIN,

DIRECT EXAMINATION BY MR. COWELL.

> "My name is Maurice L. Galvin. I am an attorney at law. I represent The Chesapeake & Ohio Railway Company, the defendant in this action and have represented it for a long time.
>
> The court: What is it that you want to prove?

Mr. Cowell: I want to put in his opening statement in the other case.

Objection sustained; to which ruling of the court the plaintiff excepts.

The plaintiff then offered said statement, which is as follows:" (Then follows the statement.)

The statement which is inserted in the record purports to be the opening statement of counsel to a jury made by Mr. Galvin, the attorney for the Chesapeake & Ohio Railway Company some six months previously at a trial in another case then in progress.

In this purported statement, counsel appears to have said in substance that in that trial he would contend that under the circumstances which he expected the proof to disclose, that Linstead was an employee of the Chesapeake & Ohio Railway Co. within the meaning of the Federal Employers Liability Act.

The foregoing embraces everything in the record bearing upon petitioner's contention of an estoppel.

It does not even appear, except inferentially, that there was another case between the same parties. The pleadings in the other case are not in the record, nor are they referred to in the present case.

There was no attempt to plead an estoppel. There is no fact in the record that could constitute a basis for such a plea, unless it be the purported statement of counsel for defendant, to the introduction of which in evidence the trial court with manifest propriety sustained an objection.

But if we go outside of the record and supply all of the facts which counsel might perhaps have presented, we think there is still no basis whatsoever for an estoppel such as is contended for.

The facts are these:

The plaintiff brought two actions. The first was under the Kentucky Statute for wrongful death. In this action

the defendant answered by traversing all of the allegations of the petition and did not, as counsel contends in his brief, affirmatively plead that decedent was its employee.

When this case came on for trial a jury was impanneled, and the opening statements of counsel on both sides were made. We will assume that the statement of counsel for the defendant was the one which counsel for plaintiff has had incorporated in this record.

After these opening statements had been made, the trial court indicated an opinion that there was perhaps some merit in the statement of counsel for defendant that Linstead under the circumstances might be considered an employee of the Chesapeake & Ohio Railway Company. Whereupon, without asking for a ruling upon the matter, counsel for plaintiff asked leave to amend his petition and the case was thereupon continued to the next term.

The amended petition was never filed, but instead counsel for plaintiff filed an entirely new suit in which he alleged that Linstead was an employee of The Chesapeake & Ohio Railway Company at the time of his injury and death. The first suit was not dismissed but is still pending and undisposed of. There has never been an adjudication in that case upon the matter of Linstead's status as an employee.

The second action came on for trial. The court ruled that Linstead was under the circumstances an employee of the Chesapeake & Ohio Railway Company within the meaning of the Federal Employers Liability Act and counsel for defendant reserved exceptions to the ruling.

It is under these circumstances that plaintiff's counsel is now insisting that defendant is estopped to contend that Linstead was not in its employ at the time of his injuries and death.

Needless to say, at the time of these proceedings neither counsel for plaintiff nor defendant knew of the ruling of this court in the case of *Hull* v. *Philadelphia, etc., Ry. Co.*, 252 U. S. 475.

Whatever may be said of an estoppel based upon an allegation of inconsistent facts, we are quite sure that it has never been held that an estoppel arises because of the position of Counsel taken on a question of law. 21 Corpus Juris, 1231-1234.

In the case at bar the facts set forth in the purported statement of counsel to the jury in the first case are substantially identical with those developed in the proof in the second case. Counsel for defendant did not misrepresent any fact, nor was opposing counsel misled as to anything. Indeed there was no controversy as to the facts relating to defendant's employment. The only difference was as to the legal effect of the admitted facts.

In *McLaughlin* v. *Western Union Telegraph Co.*, 7 Fed. Rep. (2nd series) 177, the court said:

> "Law is not an exact science, and there are many questions of law upon which a litigant may be doubtful as to his rights, and as to which he is entitled to a ruling of the court. I think a litigant has at all times a right to raise a doubtful question and may later take the contrary position as to the same law, at least until this question of law has been authoritatively decided by the court of last resort. * * * In my opinion there is a wide difference between judicial allegations of fact which operate as solemn admissions of the truth, which may not be known or provable by the other party, and judicial allegations on questions of law presenting to the court for decision a question of law equally well known to both parties. * * * In *Beerce* v. *Butchins*, 205 U. S. 240, the court said: 'It is quite true, as we have said, that the assertion of a lien is inconsistent with the assertion of a

title. *Van Winkle* v. *Crowell*, 146 U. S. 42, and therefore if a lien had been established by judgment or decree, the title would be gone by force of an adjudication inconsistent with its continuance. But the assertion of a lien by one who has title, so long as it is only an assertion and nothing more, is merely a mistake. It does not purport to be a choice and it can not be one because the party has no right to choose. The claim in the lien suit as was said in a recent case was not an election but an hypothesis. *Northern Assurance Co.* v. *Grandview Building Association*, 203 U. S. 106. The fact that a party through mistake attempts to exercise a right to which he is not entitled, does not prevent his afterwards exercising one which he had and still has unless barred by the previous attempt.'

This case shows that on a question of legal right one may assert at one time one proposition, for instance, in this case, a lien, and at another time another inconsistent proposition, for instance, a title, and that the mere assertion of a mistake on a question of law is not binding."

It has been held that where a party with knowledge of the facts assumes a certain position and *succeeds in it*, he thereafter will be estopped to assume a contrary position. *Davis* v. *Walker*, 156 U. S. 689, 21 Corpus Juris 1223. But in the instant case the defendant did not successfully maintain its position. The trial court was not asked to and did not in fact pass upon the question in the first case. Counsel for plaintiff voluntarily withdrew when the question was raised, and then brought the second suit.

We do not think any court anywhere has ever held that an estoppel arises under such circumstances.

We respectfully submit that Linstead was not an employee of The Chesapeake & Ohio Railway Company, and, therefore, had no cause of action under the Employers'

Liability Act, and this being true, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

FRANK M. TRACY,
Attorney for Defendant in Error.

MAURICE L. GALVIN,
Of Counsel.